

**DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 97-0582
Corporate Income Tax
For the Years 1992-1994**

NOTICE: Under IC 4-22-7-7, this document is required to be published in the Indiana Register and is effective on its date of publication. It shall remain in effect until the date it is superseded or deleted by the publication of a new document in the Indiana Register. The publication of this document will provide the general public with information about the Department's official position concerning a specific issue.

ISSUES

I. Gross Income Tax-Imposition of Tax

Authority: IC 6-2.1-2-2 (a)(2), IC 6-8.1-5-1 (b), 45 IAC 1.1-1-3.

The taxpayer protests the imposition of gross income tax.

II. Adjusted Gross Income Tax- Imposition of Tax

Authority: 15 U.S.C.S.381, IC 6-3-2-1 (b), Indiana Department of State Revenue v. Continental Steel Corporation, 399 N.E.2d 754 (Ind. Ct. App. 1980), Wisconsin Department of Revenue v. William Wrigley, Jr., Co., 112 S.Ct. 2447 (1992), in Black's Law Dictionary, Seventh Edition, 1999, page 774.

The taxpayer protests the imposition of adjusted gross income tax.

STATEMENT OF FACTS

The taxpayer is an out of state manufacturer of components for automobile parts. The taxpayer made its Indiana sales through the Indianapolis sales office of two related corporations. After an audit, the Indiana Department of Revenue, hereinafter referred to as the "department," assessed additional income tax for the tax period 1992-1994. The taxpayer protested the assessment contending that there was inadequate nexus with Indiana to assess gross or adjusted gross income tax. A hearing was held.

I. Gross Income Tax-Imposition of Tax

IC 6-2.1-2-2 (a)(2) imposes the Indiana gross income tax on "the taxable gross income derived from activities or businesses or any other sources within Indiana by a taxpayer who is not a resident or a domiciliary of Indiana." All tax assessments are presumed to be accurate and the taxpayer bears the burden of proving that any assessment is incorrect. IC 6-8.1-5-1 (b).

The issue to be determined in this case is whether or not the taxpayer's gross income was derived from activities or sources in Indiana, thus subjecting that income to the Indiana gross income tax.

This situation involves three corporations, the taxpayer and two corporations which sold taxpayer's product to the Indiana customer. Each of the three corporations is a wholly owned subsidiary of a holding company. Each of the holding companies is a wholly owned subsidiary of one corporation. In the last first year of the audit, the taxpayer sold its product through one related corporation's Indianapolis sales office. During the last two years of the audit, the taxpayer sold its product through another related corporation's sales office. However, the sales office never changed. Rather, the corporate structure was changed so that the sales office was part of two different corporations. The sales office was a single point of contact office for the taxpayer's only Indiana customer. Most contact between the customer and the taxpayer was handled through this office.

The Indianapolis office had two persons assigned to it. The salesman is in the office everyday. The office is used after a field call to communicate data and information to others in the taxpayer's organization. The inside salesman makes sure that all orders are entered in the computer system and assures that all orders were shipped to the right place. The office keeps track of shipment by exception which means that if the division cannot ship the product, the division contacts the sales office and the office forwards the message to the Indiana customer. If there is a problem other than quality control, the customer calls the Indianapolis office which coordinates the resolution of the problem.

All purchase orders go to the Indianapolis sales office where they are approved. This information is checked, entered into the computer system and sent to the appropriate manufacturing division. A hard copy of this order is also mailed to the manufacturing division. Specifications and blueprints are brought to the Indianapolis sales office by the salesman and copies are forwarded to the manufacturing division.

If at any time it is considered necessary, the taxpayer's engineer from its out-of-state manufacturing facility comes into Indiana to meet with the sales representatives and employees of the taxpayer's Indiana customer.

The Indianapolis office has all the Indiana customer files. These include orders kept by sequential number of the parts and drawings of all of the customer's parts. The sales office also serves as a repository for literature, bulletins, data sheets, qualification tests, and their results.

The taxpayer also provides engineering services to the customer at the customer's Indiana plant and at the Indianapolis office.

45 IAC 1.1-1-3 explains that gross income is subject to the Indiana gross income tax if it derives from Indiana activities such as the performance of services in Indiana. The United States Supreme Court considered the issue of adequate nexus to subject income from sales in a gross income tax context in Tyler Pipe Industries, Inc. v. Washington State Department of Revenue, 483 U.S. 232 (1987). In that case, Tyler Pipe Industries, Inc. manufactured pipes which it sold in Washington through a Washington sales office that was not owned by nor were the salesmen employees of Tyler Pipe Industries. The Court found that the daily significant activities of the

salespeople in Washington such as calling on customers, establishing and maintaining valuable relationships, and providing Tyler Pipe Industries with information about the needs of the customers created sufficient contact with the state to establish the nexus necessary to submit income from sales in Washington to the Washington gross income tax. This is analogous to the taxpayer's situation in that the Indianapolis sales office is not owned by the taxpayer and the salespeople are not the taxpayer's employees or agents. Even so, the Indiana sales representatives perform substantial activities in the state. These activities create the nexus necessary to subject the taxpayer's Indiana sales to the gross income tax.

FINDING

The taxpayer's protest is denied.

II. Adjusted Gross Income Tax- Imposition of Tax

DISCUSSION

Pursuant to IC 6-3-2-1 (b), Indiana imposes an adjusted gross income tax on "that part of the adjusted gross income derived from sources within Indiana of every corporation." The standard for sufficient nexus to impose the Indiana adjusted gross income tax is different than that for imposing the Indiana gross income tax.

15 U.S.C.S.381 (Public Law 86-272) prohibits states from imposing a net income tax on a foreign taxpayer if the foreign taxpayer's only business activity within that state is the solicitation of sales. A state may not impose an income tax on income derived from business activities within that state unless those activities exceed the mere solicitation of sales. 15 U.S.C.S. 381 (a), (c).

The department must determine whether the taxpayer's employees' activities in Indiana exceed the 15 U.S.C.S. 381 benchmark of "mere solicitation." Indiana Department of State Revenue v. Continental Steel Corporation, 399 N.E.2d 754 (Ind. Ct. App. 1980), defines those activities which do and do not exceed the "mere solicitation," standard. In that case, the court held that, "solicitation should be limited to those generally accepted or customary acts in the industry which lead to the placing of orders not those which follow as a natural result of the transaction, such as collections, servicing complaints, technical assistance and training. . ." Id. at 759. Further, "solicitation must be limited to those acts which lead to the placing of orders and does not include those acts which follow as a result of the transaction." Id. The court set out examples of activity which exceeded "mere solicitation" including "giving spot credit, accepting orders, collecting delinquent accounts and picking up returned goods within the taxing state, pooling and exchanging technical personnel in a complex mutual endeavor, maintaining personal property and associated local business activity for purposes not related to soliciting orders within the taxing state." Id.

The "mere solicitation" by a corporation's employees standard was refined by the Supreme Court in Wisconsin Department of Revenue v. William Wrigley, Jr., Co., 112 S.Ct. 2447 (1992). The Court concluded, "although solicitation covered more than what was strictly essential to

making requests for purchases, the fact that an activity is performed by salespersons does not automatically convert that activity into solicitation.” Id. at 2456-57.

As discussed in the first section of this Letter of Findings, the taxpayer has significant activities in Indiana through the sales personnel and sales office of its related corporation. Although the salesmen are not employees of the taxpayer, they are employees of a related corporation. “Independent” is defined in Black’s Law Dictionary, Seventh Edition, 1999 at page 774 as “1. Not subject to the control or influence of another. 2. Not associated with another (often larger) entity.” In this case, the taxpayer and the corporations managing the sales offices and their employees are both owned by the same corporation. They are, then, by definition subject to the control and influence of the corporation owning all of their holding companies and are clearly associated with the other entities. They have significant dealings with the taxpayer and are subject to the taxpayer’s instructions. As such, although they are not in the strict sense employees, they cannot be considered independent or independent contractors either. Even though the taxpayer does not employ the Indiana sales representatives, the taxpayer’s own employee engineers come to Indiana to work with the customers on product design and other issues. The taxpayer’s activities in Indiana, then, exceed “mere solicitation.” Therefore, the taxpayer is subject to the tax on the adjusted gross income from those activities.

FINDING

The taxpayer’s protest is denied.